Mar-Len Cabinets, Inc. *and* Orange County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Case 21-CA-16149

July 29, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 18, 1979, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that Respondent had violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, by its acts and conduct with respect to two separate units of employees. The Board found that Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain in good faith and by unilaterally withdrawing recognition from the Orange County District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (herein called the Union), as the exclusive collective-bargaining representative for a unit of all *inside* cabinet fabricators employed by Respondent at its Anaheim, California, facility (herein called the inside employees). The Board also found that Respondent violated Section 8(a)(5) and (1) by unilaterally instituting changes in wages and working conditions without first complying with the notice requirements of Section 8(d)(3) and (4) of the Act. The latter violation concerned only those employees of Respondent represented by the Union in a unit of all *outside* cabinet installers employed by Respondent at jobsites in 11 California counties (herein called the outside employees). The Board ordered Respondent to cease and desist from its acts and conduct in violation of the Act and to take certain affirmative action. Thereafter the Board filed an application for enforcement of its Decision and Order with the United States Court of Appeals for the Ninth Circuit.

On October 19, 1981, the court of appeals issued its decision.[2] The court affirmed the Board's findings that Respondent violated Section 8(a)(5) and (1) by its acts and conduct with respect to the unit of inside employees. However, in its consideration of Respondent's acts and conduct with respect to the unit of outside employees, the court found that the Board had not reached an issue which the court deemed necessary to resolve whether a violation had occurred; that issue was whether a notice given by the Union to the state and Federal mediation services was effective to notify the services as to the existence of the dispute between Respondent and the Union and thereby relieve Respondent of its preexisting duty, as initiator of the dispute, to notify the services. Accordingly, the court remanded the case to the Board specifically to rule on the issue.

The Board accepted the remand and advised the parties that they could file statements of position. Thereafter, both the General Counsel and Respondent filed statements of position.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The relevant facts for an analysis of the remanded issue are as follows. Respondent and the Union were parties to a collective-bargaining agreement covering Respondent's outside employees entitled: "The Carpenters Eleven Southern Counties Memorandum Agreement" (herein called the memorandum agreement or outside agreement). Pursuant to the terms of the memorandum agreement, Respondent agreed to comply with the terms of a "Master Labor Agreement" negotiated by four employer associations and the United Brotherhood of Carpenters and Joiners of America, except as certain terms of that agreement were excluded, and to comply with the terms of a variety of benefit trust fund agreements. The memorandum agreement itself contained a paragraph relating to the term and termination of the agreement, separate from the term and termination provision in the Master Labor Agreement, which read as follows:

> This Memorandum Agreement shall remain in full force and effect until June 15, 1977, and shall continue from year to year thereafter, unless either party shall give written notice to the other of a desire to change or cancel it at least sixty (60) days prior to June 15, 1977, or June 15, of any succeeding year. All notices given to the signatory parties to the Master Labor Agreement by the Unions shall constitute sufficient notice to the Contractor for the purposes of this paragraph. The Contractor and the Unions shall be bound by any renewals or extensions of the Master Labor Agreement and the Trust Agreements, or any new Agreements agreed to by the signatory parties to the Master Labor Agreement unless an appropriate written notice is given to the other party at least sixty (60) days prior to June 15, 1977, or any subsequent year, of their intent not to be bound by any new, renewed or extended Agreement.

[1] 243 NLRB 523.

[2] *N.L.R.B.* v. *Mar-Len Cabinets, Inc.*, 659 F.2d 995.

The Board and the court found that, by letter dated March 4, 1977, Respondent notified the Union of its intention to terminate or substantially modify the existing agreement between them, and that it did not wish to continue to be bound by the Master Labor Agreement but would bargain with the Union on an individual basis. By letter dated March 18, 1977, the Union notified Respondent that it did not accept Respondent's "cancellation" of their agreement. By letter dated March 22, 1977, addressed to the four employer-association signatories to the Master Labor Agreement, the Southern California Conference of Carpenters of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, notified the four associations that it wished to reopen the Master Labor Agreement. Copies of this March 22 letter were sent by the Union to the state and Federal mediation services. There was no reference to Respondent or to Respondent's dispute with the Union in the March 22, 1977, letter. By letter dated March 23, 1977, Respondent informed the Union that it was not "cancelling" its agreement during its term but that it intended not to renew its agreement with the Union. By letter dated July 13, 1977, Respondent, by its counsel, stated its willingness to negotiate a successor agreement to the memorandum agreement. At a negotiating meeting on August 4, 1977, the Union took the position that Respondent did not properly notify the Union of its intention to terminate the memorandum agreement because it had failed to notify the mediation services pursuant to the requirements of Section 8(d)(3) of the Act. The Union thereupon took the position that, because of the asserted 8(d) notification failure and in accord with the renewal language in the memorandum agreement, Respondent was bound by the terms of a newly negotiated and ratified Master Labor Agreement. By letter dated August 5, 1977, Respondent replied that it did not consider itself bound by the terms of the Master Labor Agreement, that it remained willing to negotiate a new agreement covering the unit of outside employees, and that it intended to implement its negotiating proposals for the outside employees as of August 15, 1977. On August 8, 1977, Respondent mailed notices to the Federal Mediation and Conciliation Service and the California State Conciliation Service informing those agencies of the existence of a labor dispute between Respondent and the Union concerning the outside employees. Up until that date, Respondent had not notified either the state or the Federal mediation services of its dispute with the Union concerning the outside agreement. On August 19, 1977, Respondent unilaterally implemented its proposed contract changes, thereby changing the wages and benefits of the outside employees and eliminating the union-security requirement.

Based upon these facts, we affirmed the Administrative Law Judge's Decision finding that Respondent changed terms and conditions of employment for its outside employees without providing notice to the state and Federal mediation services 30 days prior to such changes.

Upon review, the court rejected three of Respondent's contentions and found that the 8(d)(4) waiting period applies to changes in terms and conditions of employment as well as the institution of a strike or lockout, that the Union's "refusal to bargain" on the outside agreement did not relieve Respondent of its 8(d)(3) obligations, and that the Union's rejection of Respondent's initial notice did not shift the burden of the 8(d)(3) obligation which Respondent had as the initiating party nor did it place the Union in the position of the initiating party in the dispute.

However, while accepting that the initiating party bears the burden of sending 8(d)(3) notices, the court allowed for the possibility that the non-initiating party, by sending *effective* 8(d)(3) notice, may fulfill the purpose of 8(d)(3) "to give the mediation services time to intervene in an effective manner." 659 F.2d at 998. The court found that prior cases "hold only that the initiating party must bear the adverse consequences if no notice is given, or the notice given is untimely" and that "[n]o court has held that the initiating party must send a second notice when the non-initiating party has already notified the mediation agencies." In remanding the case to the Board to rule on "the effectiveness of the notification given to the mediation services by the union," the court particularly noted, "The initiating party remains at risk, however, if the notice sent by the other party was ineffective to apprise the mediation services of the particular dispute."

Having accepted the remand of this case, we accept the court's findings and conclusions as the law of the case.

In its statement of position, Respondent maintains that, pursuant to the term and termination provision of the memorandum agreement, Respondent appointed the signatory parties to the Master Labor Agreement as its agent to receive all notices from the Union, including 8(d)(3) mediation notices. Directly from that proposition, Respondent argues that the Union's March 22, 1977, letter which was copied to the mediation services "was therefore effective notice to the mediation services of contract termination or modification with regard to the Respondent." The General Counsel asserts

that Respondent was not at any material time a member of the signatory employer associations addressed in the Union's March 22, 1977, notice, that any negotiations between Respondent and the Union were necessarily separate from those between the Union and the signatory employer associations, and that the Union's March 22, 1977, notice did not constitute notice to the mediation services of the existence of a dispute with Respondent.

On the basis of the entire record,[3] we find that the Union's March 22, 1977, letter was not effective notification to the mediation services of the dispute between Respondent and the Union. It is clear that effective notice, as the court contemplated it, was such as to specifically inform the mediation services of the dispute between Respondent and the Union. The Union's March 22 notice informed the mediation services only of the dispute involving the parties to the Master Labor Agreement. However, as of the time that notice was sent, Respondent had initiated bargaining with the Union on an individual basis and thereby created a separate dispute. Thus, Respondent, having expressed the intent not to be bound by any new, renewed, or extended Master Labor Agreement, pursuant to the provisions of its memorandum agreement with the Union, insured that it would not contractually be bound by negotiations for a new Master Labor Agreement, and the Union's notices to the mediation services pertaining to the Master Labor Agreement were therefore inapplicable to it. That the dispute between Respondent and the Union was a separate dispute is manifest from its continuance long after the parties to the Master Labor Agreement had settled their dispute and reached agreement on a new contract. Therefore, it is apparent that the Union's March 22 notice, which included no reference to Respondent or to the dispute with Respondent, was not sufficient to alert the mediation services of the separate ongoing dispute between Respondent and the Union so as to enable them to intervene.

[3] Respondent submitted that the Board should not decide the issue against it without first reopening the record and permitting Respondent to call witnesses from the mediation services "to establish" the following: "that it is general knowledge in the Southern California area that the Union, in sending 8(d)(3) notice to the mediation services of contract termination or modification with respect to the employer associations, also intended to give notice to the mediation services with regard to all individual memorandum agreement employers." Assuming, *arguendo*, that witnesses employed by the Federal Mediation and Conciliation Service were permitted to testify and assuming further that testimony of such FMCS witnesses was received to establish knowledge of such intention on the part of the Union, we do not believe that such evidence would in any way alter our conclusions about the effectiveness of the notice. Accordingly, and in view of our further conclusion that the existing record provides a sufficient basis to resolve the issue raised by the court, we find it unnecessary to reopen the record for a hearing before an administrative law judge.

Thus, we find that Respondent's obligations under Section 8(d)(3) and 8(d)(4) remained unaffected by the Union's March 22 notice. Accordingly, we hereby reaffirm our prior conclusion that Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act by unilaterally implementing its bargaining proposals for employees in the outside unit without providing to the mediation services timely notice of its dispute with the Union. Accordingly, we hereby affirm and reissue those portions of our prior Order in this case at 243 NLRB 523, 539, which were not heretofore enforced by the court and substitute the attached notice to correspond with our reissued Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Mar-Len Cabinets, Inc., Anaheim, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the Union by unilaterlly implementing and giving effect to collective-bargaining proposals covering wages, hours, and terms and conditions of employment of employees in the outside unit, without fully complying with the requirements of Section 8(d)(3) and (4) of the Act, at a time when the Union retained the right to be recognized as the exclusive collective-bargaining representative of the outside employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed under Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the purposes of the Act:

(a) Make whole all outside employees for any loss of wages or benefits incurred by them as a result of Respondent's unilateral implementation of its bargaining proposals covering outside employees prior to September 8, 1977, with interest as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Anaheim, California, shop or facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with the Union, in violation of Section 8(a)(5) of the National Labor Relations Act, as amended, by unilaterally implementing bargaining proposals submitted to the Union as bargaining representative for our outside employees, and by failing to continue to fully comply with all the terms and conditions of an existing collective-bargaining agreement with the Union, or any other labor organization, for the required period of time after giving notice to the Federal Mediation and Conciliation Service and the California State Conciliation Service, as provided by Section 8(d) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make whole all our outside employees for any loss of wages or benefits they may have suffered as a result of our unilateral implementation of our collective-bargaining proposals covering outside employees prior to September 8, 1977, on which date full compliance with the notice requirements of Section 8(d) of the Act would have been achieved, with interest.

MAR-LEN CABINETS, INC.